

DISCRETE ACTS AND HOSTILE WORK ENVIRONMENTS: A SURVEY OF LEDBETTER V. GOODYEAR AND ITS LASTING IMPACT ON WORKERS' RIGHTS

By

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The United States Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.* has garnered much attention for its potential impact on a plaintiff's ability to combat workplace discrimination.¹ In *Ledbetter*, the Court held that the ongoing effects of past discrimination do not restart the clock for filing a Title VII claim. Within weeks of being issued, the decision sparked debate in Congress over proposed legislation that would overrule the Court's interpretation of Title VII.² Some groups, such as the U.S. Chamber of Commerce, assert that *Ledbetter* corrected a "profound unfairness" that would have allowed a potential plaintiff "to sleep on his or her rights for years."³ Others, like the Leadership Conference on Civil Rights, vehemently argue that the decision was a "wrong perpetrated by our nation's highest court."⁴ This essay will assess the broader impact of *Ledbetter* on workers' rights by examining *Ledbetter's* legal shortcomings and evaluating the restrictions it places on the essential rights Congress had provided to workers under Title VII.

I. A BRIEF INTRODUCTION TO LEDBETTER

A brief introduction to *Ledbetter* is necessary prior to evaluating the merits of the Court's legal analysis. The plaintiff, Lily Ledbetter, worked as the only female production supervisor at a Goodyear Tire and Rubber plant.⁵ Throughout her 20-year tenure, her supervisors conducted periodic performance evaluations and raised her salary accordingly.⁶ She later learned, however,

that the raises and evaluation ratings she received were consistently lower than those of her male colleagues.⁷ The accumulation of these lower raises left the plaintiff with a salary that was substantially less than that of every male supervisor. At trial, the plaintiff argued that even though intentionally discriminatory conduct occurred during the charge-filing period, the paychecks she received during the period constituted discrimination under Title VII since she received less money because of her gender.⁸ Although a jury found in the plaintiff's favor, the Eleventh Circuit reversed judgment, finding that the plaintiff's Title VII pay discrimination claim was untimely.⁹

In a 5-4 decision, the Supreme Court affirmed the appellate court's dismissal of the plaintiff's claim. Specifically, the majority stated that identifying "the specific employment practice" at issue is of central importance to determining timeliness.¹⁰ As explained by the majority, Ledbetter had pointed out two different employment practices that had occurred during the 180-day period: the distribution of paychecks with lower salaries and a decision in 1998 to give the plaintiff a raise.¹¹ Ledbetter claimed that each of these practices gave present effect to discriminatory conduct that had occurred outside of the 180-day charging period and that the practices therefore triggered a new filing period. The majority rejected this argument, explaining that accepting it would result in neglecting an essential need to demonstrate discriminatory intent.¹² For this reason, the Court concluded that a discriminatory pay decision is a "discrete act" that triggers the statute of limitations and that subsequent paychecks based on a disparity in salary "cannot alone breathe life into prior, charged discrimination."¹³

II. THE MAJORITY'S INTERPRETATION OF LEGAL PRECEDENT PRODUCED AN INCORRECT ANALYSIS

Although Justice Alito asserted in the majority opinion that the Court applied the statute “as written” and that the plaintiff’s policy arguments were inconsistent with legal precedent, four justices dissented. In writing for the dissent, Justice Ginsberg noted that pay disparities like those suffered in *Ledbetter* bear a much strong resemblance to hostile work environment claims than they do to discrete acts of discrimination, as claimed by the majority.¹⁴ Had the Court paid more attention to Ginsberg’s argument and made better use of precedent that it neglected, the majority’s analysis may have been very different.

Under the analytical framework used by the majority, two issues are of central importance: 1) the point at which the relevant 180-day statute of limitations began and 2) whether each paycheck issued in *Ledbetter* constituted a discrete discriminatory act or was akin to conduct typical of hostile work environment claims.

In responding to both issues, the Court looked at *National Railroad Passenger Corp. v. Morgan*, a recent Supreme Court case holding that a Title VII plaintiff raising claims of discrete discriminatory acts must file his or her charge within the appropriate 180-day period.¹⁵ However, *Morgan* also held that a charge alleging a hostile work environment will not be barred on the basis of timeliness if all acts constituting the claim are part of the same unlawful practice and at least one of the acts takes place within the filing period.¹⁶

Contrary to the advice of the dissent, the majority did not liken the discriminatory acts alleged by *Ledbetter* to a hostile work environment claim. Instead, the majority explained that what *Ledbetter* had alleged was not a *Morgan*-like single wrong consisting of a succession of facts but instead a series of discrete discriminatory acts.”¹⁷ Accordingly, each discriminatory pay

decision was a discrete act that triggered the filing period. By treating Ledbetter's paychecks as discrete acts, the Supreme Court subsequently applied *United Air Lines, Inc. v. Evans*, *Delaware State College v. Ricks*, and *Lorance v. AT&T*.¹⁸ The majority's reliance on these cases, however, was appropriate only because it had deemed Ledbetter's claims as discrete acts. As the dissent also pointed out, the cases cited by the majority can all be distinguished from *Ledbetter* in that they all involved discrete acts of discrimination that were "immediately identifiable."¹⁹ Additionally, the majority incorrectly relied on *Lorance* since the Civil Rights Act of 1991 superseded *Lorance*'s holding.²⁰

Although neglected by the majority, compelling authority exists demonstrating that the discriminatory acts alleged by Lily Ledbetter resemble a series of acts like hostile work environment sexual harassment. First, the majority rejected the plaintiff's comparison of her case to *Bazemore v. Friday*, where the Supreme Court held that "each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."²¹ Specifically, the majority reasoned that *Bazemore* is not applicable because the employer in that case had adopted a discriminatory pay structure and continued to use discriminatory pay practices.²² While this is a distinguishing characteristic, it is not clear that the presence of a discriminatory pay structure was so central to the analysis of *Bazemore* that it would render it inapplicable as authority for the present case.

Additionally, the nature of Ledbetter's allegations demonstrates that they cannot be fairly characterized as discrete actions. Unlike promotions or reassignments, a single and isolated pay decision may not possess enough evidentiary weight to demonstrate discriminatory intent. If, as the majority argues, the purpose of focusing on discrete acts is to identify the "defining element" of a Title VII claim, disallowing consideration of a consistent series of discriminatory decisions

and paychecks may cause a court to overlook the true nature of the discriminator's intent. This would leave employees with little time to determine the true nature of their employers' intentions within the majority's suggested time frame and may ultimately result in a greater number of Title VII claims that lack sufficient evidence of discriminatory intent.

The actions alleged by Ledbetter can more appropriately be characterized as constituting a hostile work environment. As the Supreme Court stated in *Morgan*, hostile environment claims are different in kind from discrete acts because "their very nature involves repeated conduct."²³ Like other hostile environment claims, the consistent and continuous nature of Ledbetter's discriminatory raises and paychecks demonstrates that she did experience unlawful employment practices that "cannot be said to occur on any particular day."²⁴ As explained in *Morgan*, courts determining whether a hostile work environment exists can look at the surrounding circumstances as well as the frequency of discriminatory conduct. Justice Thomas' majority opinion in *Morgan* also states that even subsequent events can still be part of a hostile work environment and that a "charge may be filed at a later date and still encompass the whole."²⁵ In *Ledbetter*, the disparity between the plaintiff's salary and those of her colleagues was continually widening, oftentimes after each performance evaluation. Given the incessant and continually worsening nature of this discriminatory conduct, the majority should have paid deference to the Equal Employment Opportunity Commission's stance and characterized Ledbetter's claim as one of hostile work environment.

III. THE MAJORITY'S DECISION NEGLECTS THE REALITIES OF THE WORKPLACE AND RUNS AGAINST THE SPIRIT OF TITLE VII.

The majority in *Ledbetter* decided not to directly address any of the plaintiff's policy arguments. Specifically, it explained that "it is not [its] prerogative to change the way in which

Title VII balances the interests of aggrieved employees” against the interest in encouraging the prompt processing of all charges.²⁶ Ironically, the majority’s decision has done exactly this – it has redefined the starting point for the statute of limitations period to one that is different than that adopted by many courts.

The *Ledbetter* ruling places a tremendous burden on victims of pay discrimination, especially since disparities in pay are rarely overt and salaries are “notoriously cloaked in secrecy.”²⁷ Employees often choose not to discuss their salaries. Some companies may have policies that restrict employees from discussing financial information. Additionally, an employee who does not yet know that he or she is a victim of pay discrimination will likely not seek out salary information in the first place. In the absence of terminations and obvious disparate treatment, workers may not immediately realize that they are experiencing discrimination. The majority’s decision will consequently leave those most vulnerable to pay discrimination without many options. As Justice Ginsberg pointed out in her dissent, the secrecy surrounding salary information makes it unlikely that most victims of pay discrimination will be able to pursue a Title VII claim before the expiration of the statute of limitations period.²⁸

The majority’s decision also undermines incentives for employers to prevent and correct pay discrimination.²⁹ This ruling bars any claims that involve discriminatory decisions made prior to the 180-day statutory period. As a result, many who currently earn less as a result of discrimination will have no recourse under Title VII. Additionally, employers will have little incentive to correct pre-existing pay discrimination since it will no longer be illegal as a matter of law. This will have the effect of encouraging employers to remain reticent about discriminatory decisions for a required six-month period.³⁰

Employees that suspect pay discrimination are also left in a precarious position as a result of *Ledbetter*. For many, the Court's opinion will effectively create a Catch 22: employees who merely suspect pay discrimination may be forced to file a charge within 180 days of when the discrimination begins or lose the right to challenge it.³¹ This, however, will be risky for many employees since a 180-day period will likely not elicit enough evidence to demonstrate that a salary gap is truly discriminatory. In many situations, it may simply take a pattern of pay disparities to establish an inference of discriminatory intent. Plaintiffs who wait too long may be barred from advancing their claims while those that act early enough may lose cause they cannot prove their claims. This will consequently place many of the complaining parties at odds with their employers with no legal recourse or remedy.

This dilemma, along with other adverse implications for pay discrimination victims, cannot be what the framers of Title VII had intended. The majority's decision in *Ledbetter* will act to widen salary disparities in the workplace, particularly among vulnerable groups such as ethnic minorities and women. Unless Congress acts as it did in 1991 by superseding *Ledbetter*, the decision will continue to immunize employers from accountability and tear away legal protections.

¹ David G. Savage, *Only Fresh Bias Counts, Court Rules*, L.A. TIMES, May 30, 2007, at A1.

² Jesse Lee, *Democrats Introduce the Lily Ledbetter Fair Pay Act*, Education and Labor Committee, at <http://www.speaker.gov/blog/?p=513> (June 22, 2007).

³ Neal D. Mollen, Statement of U.S. Chamber of Commerce, *Justice Denied? Implications of the Supreme Court's Ledbetter Employment Discrimination Decision*, Testimony at House Committee On Education and Labor (June 12, 2007).

• ⁴ Wade Henderson, Leadership Conference on Civil Rights, *Justice Denied Implications of the Supreme Court's Ledbetter Employment Discrimination Decision*, Testimony at House Committee On Education and Labor (June 12, 2007).

⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074, 550 U.S. ___, 2007 WL 152898, *1 (2007).

⁶ *Id.*

⁷ *Id.* at *2.

⁸ *Id.*

⁹ *Id.*

10 *Id.* at *3.
11 *Id.*
12 *Id.*
13 *Id.* at *5.
14 *Id.* at *13 (Ginsberg, J., dissenting).
15 *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002) .
16 *See Id.* at 118.
17 *Ledbetter*, 550 U.S. at *10.
18 *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Delaware State College v. Ricks*, 449 U.S.
250 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).
19 *Ledbetter*, 550 U.S. at *17 (Ginsberg, J., dissenting).
20 *Id.*
21 *Bazemore v. Friday*, 478 U.S. 385, 395 (1986).
22 *Ledbetter*, 550 U.S. at *10.
23 *Morgan*, 536 U.S. at 115.
24 *Id.*
25 *Id.* at 117.
26 *Ledbetter*, 550 U.S. at *13.
27 ACLU Amicus Brief for Plaintiff at 2, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. __ (2007) (No.
05-1074).
28 *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. at *19 (Ginsberg, J., dissenting).
29 ACLU Amicus Brief for Plaintiff at 2, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. __ (2007) (No.
05-1074).
30 *Id.*
31 Joanna Grossman and Deborah Brake, *The Supreme Court Slams the Door on Pay Discrimination Claims:
The Ruling in Ledbetter v. Goodyear Tire & Rubber Co.*, FindLaw (June 4, 2007),
http://writ.news.findlaw.com/commentary/20070604_brake.html.